IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 681

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Plaintiff-Appellant,

and

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Intervener Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendant-Appellees,

and

ERIE-LACKAWANNA RAILROAD COMPANY,
Intervener Defendant-Appellee.

MEMORANDUM OF APPELLEE ERIE-LACKAWANNA RAILROAD COMPANY AND APPENDIX

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February 3, 1961

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No. 681

MEMORANDUM OF APPELLEE ERIE-LACKAWANNA RAILROAD COMPANY AND APPENDIX

On January 23, 1961, this Court denied appellants' application for a stay pending appeal without prejudice to its renewal upon prompt docketing of the appeal. Appellants have docketed their appeal and renewed their application for a stay.

The purpose of this memorandum on behalf of Erie-Lackawanna Railroad Company (hereinafter referred to as Erie-Lackawanna) is three-fold: First, to define properly the sole question presented to this Court on this appeal; second, to demonstrate that the renewed application for a stay should be denied; and third, to set forth the reasons why the Erie-Lackawanna, although it believes that summary affirmance without argument is appropriate, wishes to waive its right to file a motion to affirm.

I

THIS COURT SHOULD LIMIT ITS CONSIDERATION TO THE SOLE QUESTION RAISED BY APPELLANTS BEFORE THE COMMISSION AND THE COURT BELOW.

The Jurisdictional Statement asserts that five questions are presented for review (pp. 5-6). In fact, however, as the Jurisdictional Statement itself demonstrates, there is only a single question presented* (see, generally, pp. 11-25, and particularly pp. 11, 12, 13 and 25). The sole question raised by appellants before the Interstate Commerce Commission (hereinafter referred to as the Commission) and the court below, properly stated, is

> Whether Section 5(2)(f) of the Interstate Commerce Act (54 Stat. 906, 49 U. S. C. § 5(2)(f)) requires the Commission to impose as a minimum, upon every transaction approved under Section 5(2) the requirement that every employee affected by an approved transaction must be retained in an active employment status for a period equal in time with his service to the railroad, not to exceed four years.

---

*The fifth question presented by appellants raises a procedural problem, unsubstantial on its face and virtually abandoned in the Jurisdictional Statement.

Preservation of an active employment status does not mean continuation of each and every employee in precisely the same job that he held prior to the effective date of the merger—a "job freeze". Appellants have repeatedly stated that their version of Section 5(2)(f) of the Act would not require that result.

The Railway Labor Executives' Association (hereinafter referred to as RLEA) first raised the sole question after the record before the hearing examiner was closed. The conditions sought by RLEA appear at Appendix F to the examiner's recommended report and provide (R.—*, Examiner's Proposed Report, App. F, p. 2):

> "It should be the intent and effect of the foregoing conditions that all employees adversely affected by the merger prior to a date four years from the effective date of the order of approval are to receive as a minimum the protection afforded by the second sentence of Section 5(2)(f), namely, *complete preservation of employment for four years, . . .*" (emphasis added)

That was the sole question considered by the full Commission, as follows (Report of The Commission, sheet 11):

> "The association [RLEA] contends that section 5(2)(f) of the act requires the prescription of labor protective conditions adequate to assure the employment of all adversely affected employees for a minimum of 4 years after the effective date of the merger, rather than the providing of compensation in lieu of employment."

That was the single question raised by appellants in the court below and the sole question considered by that court.

---

*The pages of the certified record on file with this Court have not been numbered.

At the argument on the merits before the District Court, appellants' counsel stated (Transcript of Hearing, Nov. 15, 1960, p. 22):

> "The jobs can be changed and employees may have to move. They may get other jobs. But they have to be comparable jobs at comparable wages. The jobs are not necessarily frozen.
>
> That is our position."

Accordingly, in its opinion, the District Court clearly defined the issue presented for its decision. (Jurisdictional Statement 2a, 3a):

> "The sole question presented is whether this provision requires the Interstate Commerce Commission to impose as a minimum upon every transaction approved by the Commission under Section 5(2) the condition that every employee affected must be retained in an *employment status* for a period equal in time with his service to the railroad carrier, not to exceed four years."
>
> * * *
>
> "It is plaintiffs' [appellants here] contention that *anything* short of actual continued employment is violative of the language and intendment of Section 5(2)(f) with respect to the phrase therein 'being in a worse position with respect to their employment'." (emphasis in original)

Accordingly, Erie-Lackwanna submits that if thi Court notes probable jurisdiction, it should limit consideration to this single question.

II

THE RENEWED APPLICATION FOR A STAY SHOULD BE DENIED.

Appellants do not advance one new argument or fact to support granting a stay which was not before this Court when it entered the order of January 23, 1961.* Appellants rely simply upon the unsworn statements in their original papers, elaborated somewhat in their Jurisdictional Statement.

In opposing the original application for a stay, Erie-Lackawanna pointed out the numerous reasons why a stay should be denied.

First, a stay would be contrary to the public interest. As the Commission found, Erie-Lackawanna should be allowed to effect the economies in service contemplated by the merger plan and thus maintain its service to the public. Therefore, in accordance with *Virginian Ry.* v. *United States*, 272 U. S. 658 (1926), appellants would not be entitled to a stay even if they had clearly established some irreparable harm.

Second, appellants have made no factual showing of actual harm of any kind. On this crucial issue appellants offer only speculation as to what may happen.

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*For the convenience of the Court, since only a single set of papers has been previously filed, we are printing as appendices to this Memorandum the relevant material as follows:

Appendix A—the temporary restraining order entered by Judge Thornton as a single judge, prior to impaneling of the three-judge court, which that court, after deciding adversely on the merits to appellants, and after further hearing on a stay pending appeal, refused to continue in effect. It is this temporary restraining order which appellants seek to reinstate by their renewed application for a stay.

Appendix B—Appellants' original motion for a stay, addressed to Justice Stewart.

Third, the Erie-Lackawanna is in a precarious financial position, which has been compounded and aggravated by its inability to merge operations and functions and to establish the economies which the merger plan contemplated. Its critical financial situation has been described in the White affidavit, Appendix C, at pp. 3-6, and, more current figures filed with the Commission since that affidavit was prepared demonstrate that the situation further deteriorated in the month of December 1960. In that month, Erie-Lackawanna suffered an operating loss of $3,866,439.69, bringing its operating loss for the year 1960 to $19,995,-613.86.

Fourth, a special three-judge district court unanimously affirmed a unanimous order of the Commission rejecting the interpretation of Section 5(2)(f) of the Interstate Commerce Act contended for by appellants, and that court, thoroughly familiar with the record, unanimously denied a stay pending appeal.

Finally, Erie-Lackawanna, mindful of the desirability of minimizing inconvenience to individual employees, made specific representations regarding how it would proceed in the absence of a stay in carrying out the merger.

In the light of those facts, and particularly the representations of Erie-Lackawanna, this Court denied appellants' application.

Appendix C—Erie-Lackawanna's memorandum opposing that motion, with attached affidavit of Garrett C. White.

Appendix D—Erie-Lackawanna's supplemental statement opposing such motion.

Appendix E—Memorandum for the United States and the Interstate Commerce Commission opposing that motion.

Appendix F—Appellants' reply.

Appendix G—The order of this Court denying the application for stay without prejudice.

Appendix H—Appellants' renewed application for a stay.

In their renewed application appellants rely on two of the grounds raised in their original application. Essentially, those grounds are, as follows:

1. Appellants contend that, unless Erie-Lackawanna is restrained, it will take action "which will render the status quo impossible of subsequent restoration and thereby will effectively deprive appellants of their statutory right of appeal" (see Appendix H).

That claim of mootness is specious. As pointed out in Erie-Lackawanna's initial opposition to the motion for stay, the plan of merger will take five years to effectuate and, hence, many employees will not feel the impact of the merger until a substantial portion of that period has expired.* In addition, it is clear that a claim of technical mootness in a case of this nature will not defeat jurisdiction of this Court (see authorities cited in Appendix C at p. 32a). Accordingly, appellants' claim of mootness is groundless.

2. The sole remaining ground urged upon this Court as a justification for the granting of a stay is that jobs will be abolished, "bumping" will ensue and employees will be required to move. The renewed application seeks to prevent Erie-Lackawanna from abolishing jobs or moving employees. Such a job freeze would be far broader than the relief which appellants seek on the merits. Appellants do not contend that Section 5(2)(f) of the Interstate Commerce Act prohibits abolition of jobs or transfer of employees. Appellants have contended throughout this proceeding only that Section 5(2)(f) requires Erie-Lackawanna to maintain all employees *in an active employment status* and have readily conceded that job abolishment and

*That fact is conceded by appellants at numerous places, *e.g.*, the second QUESTION PRESENTED at page 5 of appellants' JURISDICTION STATEMENT.

job transfer are a necessary part of the conditions which they seek. (See p. 4, *supra*)

As to "bumping"—the displacement of junior employees by senior employees—that process is created by the union seniority system and is governed by agreements with the various unions. "Bumping" does result from job abolishment and job transfer, but it is not something against which appellants claim Section 5(2)(f) protects employees affected by the merger. It is an orderly process, pursuant to agreement between the railroad and the various unions, which will necessarily follow the imposition of the New Orleans conditions, or of the condition sought by appellants, when jobs are abolished or transferred.

Moreover, the spectre of "bumping" and the image of families in aimless transit which emerge from the various papers filed on behalf of appellants are dispelled by the assurances of careful planning in Erie-Lackawanna's supplemental memorandum of January 12, 1961.

In accordance with those assurances, Erie-Lackawanna has made no job transfer as a result of merger which has required a change of residence by an employee represented by appellants. Further, Erie-Lackawanna has authorized us to assure this Court that, pending decision on the merits, all planned job transfers of employees represented by appellants which will require a change of residence will be transfers to regular job assignments in accordance with applicable agreements with the labor organizations governing the rights of individual employees.

Finally, Erie-La[illegible], for the reasons stated herein, will waive the right to file a separate motion to affirm in order to expedite final determination of this matter.

III

THE REASONS WHY ERIE-LACKAWANNA IS WAIVING THE FILING OF A MOTION TO AFFIRM.

Although Erie-Lackawanna believes that a motion to affirm would be proper, it hereby waives its rights to file such a motion, and is ready to meet any accelerated briefing schedule if this Court should desire argument on the merits.

Erie-Lackawanna believes that the question presented is simple and that the opinion below was clearly correct. However, we recognize that if the Court should decide to note probable jurisdiction and hear oral argument on the question presented, the filing of a motion to affirm and appellants' opposition thereto would merely delay final determination. It is of crucial importance to Erie-Lackawanna that final resolution be achieved as rapidly as possible. Accordingly, should this Court determine that oral argument and further briefing are desirable, Erie-Lackawanna requests an accelerated schedule in order that there may be an early determination on the merits.

In waiving its right to file a motion to affirm, Erie-Lackawanna recognizes that it is for the Court to determine whether plenary consideration is warranted. It is submitted that the opinions of the Commission and the district court are so plainly correct that it would not be inappropriate for this Court, on its own motion, to affirm summarily on the basis of those opinions. As the Court below held, the plain language of the pertinent part of Section 5(2)(f) clearly does not require as a minimum that all employees be continued in an active employment status. In contrast, it is to be noted that when Congress desired to impose such an employment freeze, it used language specifically requiring that result. (See the Emergency Railroad Transportation Act of 1933, 48 Stat.

211 and the Communications Act of 1943, 47 U. S. C. 222(f).)

With respect to the legislative history of the critical portion of Section 5(2)(f), appellants are faced with the impossible task of demonstrating that the language of the rejected Harrington amendment which provided "that no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of a carrier or carriers, or the impairment of existing employment rights of said employees" means exactly the same thing as the language of Section 5(2)(f) that no employees shall be "in a worse position with respect to their employment". Such a demonstration, however nimbly articulated, flies in the face of reality and common sense.

Accordingly, the Commission has, during the twenty-year life of the disputed provision, consistently imposed compensatory conditions upon all transactions approved under Section 5(2). In those numerous proceedings the RLEA has repeatedly concurred. This Court, in so far as it has had occasion to deal with the problems raised by this appeal, has indicated that Section 5(2)(f) does not require complete preservation of employment. *Railway Labor Executives' Association* v. *United States*, 339 U. S. 142 (1950); *Order of Railroad Telegraphers* v. *Chicago and N. W. Ry.*, 362 U. S. 330, 345 (dissenting opinion 1960).

Moreover, the policy reasons for rejecting appellants' contentions are sound and well considered. As the Court below held, the construction for which appellants contend "would sterilize provisions of the Act which is designed to promote economy partially through the reduction of personnel. It seems to us that if Congress had intended such a result it could have, and would have, said so in unequivocal language." (Jurisdictional Statement 8a) Similarly, the

Commission in rejecting appellants' contention stated (Report of the Commission, sheets 17-18):

> "In our opinion, the association's newly asserted position that the act requires us to maintain railway employees in their jobs is incorrect and untenable. Assuming that we have the power to impose conditions like those requested by the association, in our opinion, such action would not be consistent with the public interest. Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers."

CONCLUSION

For the foregoing reasons, the renewed application for a stay should be denied, and, if this Court should decide to note probable jurisdiction, it should fix a schedule which will permit the appeal to be briefed, argued and disposed of during the present Term.

February 3, 1961.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and RAILWAY LABOR EXECUTIVES' ASSOCIATION, Intervenor, *Plaintiffs,* v. UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY and ERIE RAILROAD COMPANY, Intervenors, *Defendants.*	Civil Action No. 20575

At a session of said Court held at Detroit, Michigan, on the 14th day of October, 1960.

Present: HONORABLE THOMAS P. THORNTON,
District Judge

Plaintiff Brotherhood of Maintenance of Way Employes having filed its complaint challenging an order of the defendant Interstate Commerce Commission (entered September 13, 1960 effective October 15, 1960) approving of a merger of the Delaware, Lackawanna and Western

Railroad Company and the Erie Railroad Company, and said railroad companies having intervened as additional parties defendant and the Railway Labor Executives' Association having intervened as an additional party plaintiff, and said plaintiffs having applied for the issuance of an order restraining the operation of the said merger order until plaintiffs' application for an interlocutory injunction can be heard and determined by a three-judge court in accordance with 28 USC §§ 2284 and 2335, all of the defendants having been given notice of the hearing on said application for restraining order, said application having come on for hearing, evidence having been taken and counsel for all of the parties having been heard, and

Plaintiffs having requested that said merger order be restrained only insofar as it adversely affects the employment of employees represented by Plaintiffs, and

Plaintiffs and said railroad defendants having agreed that on October 17, 1960 the merged company, Erie-Lackawanna Railroad Company (Erie-Lackawanna) will take into its active employment all employees of the Erie Railroad Company and the Delaware Lackawanna and Western Railroad Company, represented by the Brotherhood of Maintenance of Way Employees (BOMW) or any other labor organization whose chief executive is a member of the Railway Labor Executives Association (RLEA), who had an active employment status (i.e. not on furlough) on October 12, 1960; this provision not to adversely affect the rights of employees of the Erie or the Lackawanna represented by said BOMW or any other labor organization whose chief executive is a member of RLEA who were on furlough on October 12, 1960

Appendix A

IT IS ORDERED THAT:

The Erie-Lackawanna shall not abolish the position of, or furlough, any employee represented by said BOMW or any other labor organization whose chief executive is a member of RLEA who had an active employment status with either the Erie or the Lackawanna railroad companies on October 12, 1960, by reason of the merger of these railroad companies, pending the entry of further order by this court, sitting as a statutory three-judge court in this proceeding.

This restraining order shall not prevent the Erie Lackawanna from consolidating any functions of the merged company and transferring such positions as are required for such consolidations, but no employee of the Erie or of the Lackawanna represented by said BOMW or any other labor organization whose chief executive is a member of RLEA holding an active employment status on October 12, 1960 shall be required to transfer his place of employment pending the entry of a further order by this court sitting as a statutory three-judge court in this proceeding, except pursuant to the terms of an interim and/or implementing agreement with the appropriate collective bargaining representative representing such employee pursuant to the provisions of the Railway Labor Act, provided, that nothing in this order shall supersede any interm and/or implementing agreement which heretofore may have been entered into between the Erie and/or the Lackawanna and any such collective bargaining representative.

The Court specifically finds that unless this restraining order is issued, irreparable damage will result to the employees represented by said plaintiffs, which finding is based upon the testimony and exhibits of Harold C. Crotty that

the merger, if not so restrained, will cause the dislocation and displacement of some of such employees by the abolition of employment, the required exercise of seniority rights, the movement of employees and their families, and the loss of fringe benefits and annuity rights by some employees and that if such effects are not restrained it will be impossible to subsequently restore the status quo.

THOMAS P. THORNTON
District Judge

A TRUE COPY
John J. Ginther, Clerk

By /s/ Frederick M. Johnson
Deputy Clerk

APPENDIX B

IN THE

SUPREME COURT OF THE UNITED STATES

UNDOCKETED, OCTOBER TERM, 1060

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and ERIE-LACKAWANNA RAILROAD COMPANY,
Appellees.

ON APPEAL FROM THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

MOTION FOR STAY

To the HONORABLE POTTER STEWART, Associate Justice of the Supreme Court of the United States:

The appellants, Brotherhood of Maintenance of Way Employes and Railway Labor Executives' Association, having under date of January 9, 1961, filed their Notice of Appeal from an Order of the United States District Court for the Eastern District of Michigan, Southern Division, a copy of which Notice is hereto appended, respectfully move the Court for an order staying the effect of the said Order of the District Court insofar as it lifts the temporary restraining order theretofore entered by that court pending final disposition of this appeal by this Court.

Appendix B

I

Statement as to Application Previously Made

On December 8, 1960, the Appellants made application to the Honorable Clifford O'Sullivan, Circuit Judge, the Honorable Theodore Levin, Chief District Judge, and the Honorable Thomas P. Thornton, District Judge, being the judges who entered the Order dismissing the complaint and lifting the temporary restraining order, for the purpose of securing a stay of the lifting of the temporary restraining order pending final disposition by this Court of the appeal from said Order of the District Court, and on December 19, 1960, the said judges entered an order denying the application for a stay, copy of which is attached hereto.

II

Brief Summary Statement as to the Basis of the Case

This case involves a suit to set aside, enjoin, annul and suspend, in part, an order of the Interstate Commerce Commission issued pursuant to Section 5(2) of the Interstate Commerce Act [49 U. S. C. 5(2)]. The Commission's order approved the merger of the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company subject to certain conditions. The object of the suit is to restrain and enjoin that part of the Commission's order which permits the abolishment of jobs and the dislocation of employees until such time as the employee protective conditions required by Section 5(2)(f) can be imposed. The Commission held that subparagraph (f) of Section 5(2)

does not require that employees be protected with respect to their employment but need merely be given partial financial compensation in lieu of employment even though subparagraph (f) specifically provides that in approving a transaction subject to Section 5(2) the Commission shall provide in its order of approval terms and conditions which require that for a period of up to four years from its date, depending upon an employee's length of service, the transaction approved shall not result in employees of the railroad carriers affected "being placed in a worse position with respect to their employment" than they otherwise would have been.

The Commission's conditions provided for partial financial compensation to employees who would be deprived of their employment, placed in lower paying jobs, or required to move as a result of the approved transaction.

The conditions providing such compensation are commonly referred to as the "New Orleans conditions" and are an outgrowth of the decision of this Court in *Railway Labor Executives' Association* v. *United States,* 339 U. S. 142, which involved the New Orleans Union Passenger Terminal, hence the name "New Orleans conditions".

The appellants challenged the imposition of these conditions as violative of the requirements of the provision of Section 5(2)(f) above noted in the particular circumstances surrounding this case; circumstances which had not arisen in the twenty-year history of the statute. The appellants informed the Commission that such challenge had not been theretofore made because the full protection provided by Section 5(2)(f) previously had not been required as the existence of Section 5(2)(f) had never before threatened the entire labor force of the railroad industry.

Subparagraph (f) had been enacted in 1940 to protect the railroad labor force from the effects of wholesale

mergers and consolidations which the authors of Section 5(2) envisioned as following immediately upon enactment of that provision. Such wholesale mergers did not take place in 1940 or 1941 and indeed did not come about until 1959 and 1960 when the railroads, apparently *en masse*, decided to exercise the rights which Congress had granted them in 1940 to accomplish the very type of mergers which the authors of Section 5(2) had in mind when they drafted that provision and the employee protective provisions found in subparagraph (f).

At the present time there are now contemplated some ten major railroad mergers. The majority of the savings to be realized by the railroads through these mergers admittedly are realized primarily at the expense of the railroad labor force through the abolishment and transfer of jobs.

Since the railroads only now have decided to exercise the rights which were granted them by Congress in 1940 under Section 5(2) and thereby directly threaten the labor force of the railroad industry, the appellants called for the imposition of those conditions which Congress granted them in the 1940 Act and which Congress intended be afforded railroad employees where a wholesale threat to employment in the industry is presented.

The appellants took the position before the Commission and before the Court below that the plain language of the statute, its legislative history and the interpretation placed on that statute by this Court in its decisions in *Railway Labor Executives' Association* v. *United States*, 339 U. S. 142 (1950) and *The Order of Railroad Telegraphers* v. *The Chicago and Northwestern Railway Co.*, 362 U. S. 330 (1950), clearly require the Commission to condition ap-

proval of a merger upon a requirement that for a period of up to four years following Commission approval (depending upon the length of service of the particular employees involved) the merged railroad provide equivalent jobs at equivalent pay to all employees and that, at least for that period of time, the savings to be realized at the expense of the labor force occur through the process of natural attrition, i.e., as deaths, retirements, resignations, etc., take place. (See copy of appellants' brief and reply memorandum filed with lower court which is attached hereto.) Such a requirement could have no adverse effect on the merged railroad since, according to its own testimony, the rate of jobs created by attrition exceeded the number of jobs to be abolished by 600%. (See "Study XVI, Schedule A" of Railroads' Exhibit No. H-48 before the Commission attached hereto.)

III

Jurisdiction

The jurisdiction of this Court to entertain appellants' appeal from the order of the lower court rests upon 28 U. S. C. § 1253.

IV

The Ruling Below and the Reason for Appeal

The court below held that the words "in a worse position with respect to their employment" do not mean that an employee may not be deprived of his employment and its concomitant rights. The court, however, does not state precisely what else such langauge could possibly mean. In addition, after holding that the requirement that an employee

could not be placed "in a worse position with respect to his employment" did not mean that he could not be deprived of, or otherwise worsened with respect to his employment the court went on to hold that the language was not ambiguous.

The appellants prosecute their appeal to this Court, not only because it is their statutory right to do so under 28 U. S. C. § 1253 but primarily because of the imminent threat facing the entire railroad labor force in the United States as a result of the sudden and extensive exercise by the railroads of the statutory authority granted over twenty years ago. This appeal is also prosecuted because the decision below misinterpreted the plain language of Section 5(2)(f), ignored the overwhelming evidence to be found in the legislative history of this statute and failed to apply and is in conflict with the interpretation placed upon Section 5(2)(f) by this Court in *Railway Labor Executives' Association* v. *United States,* 339 U. S. 142, and *The Order of Railroad Telegraphers, et al.* v. *Chicago and North Western Railway Company,* 362 U. S. 330. (See copy of opinion of three-judge court attached hereto.)

V

Reason for Requesting a Stay

Unless a stay of the judgment and order below is granted, at least insofar as it lifts the temporary restraining order, appellants and the employees they represent will be irreparably injured during the pendency of the case in the Supreme Court and will be deprived of their statutory right to have their cause reviewed by this Court.

The temporary restraining order issued below was not granted *ex parte.* It was granted after a full hearing in

open court which convened at 9:30 A. M. on October 12, 1960, and adjourned at approximately 4:00 P. M. the same day and at which time all parties were given opportunity to present and cross-examine witnesses and introduce all relevant testimony and exhibits and from which was developed a record covering 132 typewritten transcript pages and seven exhibits.

Toward the close of the hearing the Court made the following findings with regard to irreparable injury (transcript of hearing, October 12, 1960, pages 120-121):

> "THE COURT: I am going to grant the motion for the temporary restraining order on the basis of testimony adduced by the plaintiff through the person of Mr. Crotty, who is presently President of the Maintenance of Way Employes, and who has held that office for two years, and who held the office of Assistant President for a period of eight or ten years prior to the two years that he has been President.
>
> "He qualified as an expert. I was impressed with his honesty, his sincerity and frankness, and he appeared to me as a witness that answered honestly the questions that were put to him by the direct examination as well as the cross examination.
>
> "He testified that the reimbursement for the moving in the event that an employee is required to move by virtue of the merger only encompasses the original moving, and, if there is a bumping that involves more than one moving, any subsequent moving would not be paid for by the railroad.
>
> "He testified that fringe benefits would become inoperative.
>
> "He testified that annuity rights might be jeopardized; that employees of ten years or more seniority would probably not be disturbed in their annuity rights, but anybody with less than ten years

of seniority would have his account transferred to Social Security.

"He testified it would be impossible, in his opinion—and he was speaking as an expert in my opinion—to place the men back in status quo in the event that they were dislocated by virtue of the merger.

"And, I find as a fact that those different items add up to irreparable damage when it is testified by the expert that it would be his conclusion that there would be a great possibility that those rights would be lost forever."

On October 14, 1960, the Court entered its temporary restraining order, a copy of which is appended hereto, which states, in part, as follows:

"The Court specifically finds that unless this restraining order is issued, irreparable damage will result to the employees represented by said plaintiffs, which finding is based upon the testimony and exhibits of Harold C. Crotty that the merger, if not so restrained, will cause the dislocation and displacement of some of such employees by the abolition of employment, the required exercise of seniority rights, the movement of employees and their families, and the loss of fringe benefits and annuity rights by some employees and that if such effects are not restrained it will be impossible to subsequently restore the status quo."

The explicit finding of the court below is that unless the status quo with regard to employees is maintained the employees represented by plaintiffs will be irreparably damaged and if the effects of the merger insofar as employees are concerned is not restrained "it will be impossible subsequently to restore the status quo." That finding was never

modified by the lower court nor did the court receive any further evidence on this subject.

Since, as the lower court found, irreparable harm will result to the employees represented by plaintiffs if the *status quo* as preserved by the temporary restraining order is destroyed, since "it will be impossible subsequently to restore the status quo"; and since the precise object of this case, the injunction against job abolishments and dislocation of employees pending imposition of the protective conditions required by Section 5(2)(f), will be destroyed by the lifting of the temporary restraining order, the plaintiffs will be deprived of their statutory right to have their case reviewed by the Supreme Court of the United States if the temporary restraining order is not continued pending appeal to this Court.

Should the temporary restraining order not be continued and the job abolishments and transfers take place, the irreparable damage noted above will result to employees and the Supreme Court will be confronted with a *fait accompli* about which it could do nothing. The Supreme Court would be faced with deciding a sterile question of law which may result in the dismissal of the appeal as moot. In the case of *Pink, et al.* v. *Continental Foundry & Machine Company, et al.*, 240 F. 2d 369 (1957), the United States Court of Appeals for the Seventh Circuit dismissed an appeal to the United States District Court for the Northern District of Indiana, Hammond Division, on the grounds that the appeal had become moot. In that case minority stockholders brought an action to enjoin the sale of corporate assets and the liquidation of a corporation. The plaintiffs in that case, however, did not join the purchaser of the assets as a party defendant and when the stockholders' suit was dismissed

they made no attempt to have the status quo maintained pending appeal. During the pendency of the appeal the sale of the assets was completed and such assets passed from the court's jurisdiction by the act of the corporation, but without fault on its part, and the Court of Appeals held that there was nothing it could do to restore the status quo should the stockholders' appeal be upheld. Therefore, the appeal had become moot and was dismissed.

In the course of its opinion, the Court said (240 F. 2d at 374):

> "The general law, as well as the law in this circuit, has long been established that if pending an appeal an event occurs which renders it impossible for the appellate court to grant any relief or renders a decision unnecessary the appeal will be dismissed. Selected Products Corporation v. Humphreys, supra, citing many cases. The court went to say [86 F. 2d 823]: 'There must be an actual controversy; an appeal will not be entertained to determine moot questions, and it will be dismissed, therefore, if by act of the parties or otherwise the circumstances have so changed that it is impossible or unnecessary for the appellate court to grant relief.' Among the cases that were cited in support of the above principle is American Book Co. v. State of Kansas, 193 U. S. 49, 24 S. Ct. 394, 48 L. Ed. 618, which, in turn, cited Mills v. Green, 159 U. S. 651, 16 S. Ct. 132, 133, 40 L. Ed. 293, where the court said: 'The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from a judgment of a lower court, and without any fault

> of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal'."

If the temporary restraining order is not reinstated, this Court would find it impossible to restore the status quo and therefore a decision of this Court upholding the plaintiffs' cause of action could not be carried out by the imposition of the employment protection conditions required by Section 5(2)(f).

Should the temporary restraining order not be reinstated and the defendant railroad abolishes and transfers jobs in pursuance of its merger plans, the employees' only protective rights will be found in the provisions of the so-called New Orleans conditions, the Washington Agreement and other agreements now in effect between the railroad and the representatives of its employees.[1]

Should the railroad abolish and transfer jobs, the partial financial compensation provided by the so-called New Orleans conditions theoretically will become operative. However, no payments to employees pursuant to such conditions are made unless so-called implementing agreements are executed by the railroad and representatives of employees affected providing a method of presentation of claims and payments of compensation. The plaintiffs will be unable to permit the employees which they represent to be deprived of their livelihood or undergo the great expense which a change in residence often incurs without executing imple-

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[1] A pamphlet copy of the "New Orleans" conditions, the Washington Agreement and other types of conditions imposed by the Commission is attached hereto.

menting agreements which will enable such affected employees to receive the partial financial compensation provided by the New Orleans conditions. Once such agreements are entered into and benefits therunder are accepted, the very purpose of this action will be destroyed and an appeal to the Supreme Court from the decision of the lower court may be then dismissed as moot.

The temporary restraining order should be continued unless plaintiffs' case is patently frivilous which, we respectfully submit, it clearly is not, but even that question should be presented to the Supreme Court for decision. Such a decision from this Court can be obtained almost immediately by the filing of a motion to affirm.

If the motion to affirm were granted the matter would be swiftly closed but if such a motion were denied and probable jurisdiction were noted it seems obvious that plaintiffs' statutory right of review and this Court's intention to review should not be thwarted by the lifting of the temporary restraining order.

At the hearing before the three-judge statutory court on the plaintiffs' motion for stay pending appeal to this Court no evidence regarding irreparable damage or mootness was received by that court, however, Circuit Judge O'Sullivan, presiding, made the following statement from the bench in contradiction of the previous specific findings of the court which were based upon the evidence adduced at the October 12, 1960, hearing (Transcript of hearing, December 19, 1960, pp. 45-46):

> "I think I might say this much—at least it is my own thinking and I believe the other members of this Court are not in disagreement with me—that I have such confidence in the judicial processes avail-

able to the litigants in this case, particularly the plaintiffs, that if our decision here is erroneous and the Supreme Court feels that the relief prayed for in the Bill of Complaint should be granted and issues its mandate, then our courts and administrative agencies are not without the power and resourcefulness that will provide protection of all the persons here represented by plaintiffs.

"We have seen that in the National Labor Relations Board many times. They have been faced with what you might be pleased to call 'unscrambling,' but the fact that difficulties had been encountered did not stay them from proceeding to carry out what they thought was right to protect employees that had been hurt or injured by some difficulty that had arisen in the area of labor and management relations.

"We think that the railroad is going to have to obey any mandate that may come out of the Supreme Court. And I am not of the opinion that this case will be rendered moot by our refusal of a stay order at this time.

"And, if our decision is correct, then, of course, the New Orleans conditions are going to be applied. If the decision is reversed, directions can be made by the Supreme Court in sending it back to the Interstate Commerce Commission to impose conditions and to carry out what it thinks is the right thing to do in the case.

"So, the motion to stay proceedings is denied.

"MR. MAHONEY: Your Honor.

"HON. CLIFFORD O'SULLIVAN: Yes, Mr. Mahoney.

"MR. MAHONEY: Could we have a stay until we can get before Justice Stewart?

"HON. CLIFFORD O'SULLIVAN: Mr. Mahoney, I think not. The motion for a stay is denied. If you

> get to Justice Potter Stewart within the time you anticipate, and if he thinks a stay should be granted, I am quite confident that his stay order can be such as to protect everybody."

It is to be noted that Judge O'Sullivan at no time stated that he thought the lower court had erred in issuing the temporary restraining order originally or that the findings regarding irreparable damage and the impossibility of the restoration of the status quo were not fully supported by the evidence.

Neither Judge O'Sullivan nor Judge Levin were present at the hearing which resulted in the issuance of the temporary restraining order and would not accept the transcript of that hearing as evidence at the hearing on the merits.[2] Whether they had read the transcript of the hearing on the temporary restraining order and felt the Judge who issued the order had erred (which they did not say) or whether they were convinced that plaintiffs had no merit whatever to their case is unknown. All that is known regarding the views of that court on this matter is contained in the above-quoted remarks of Judge O'Sullivan.

Judge O'Sullivan states that should the restraining order be lifted and plaintiffs ultimately prevail the courts and administrative agencies would have the power and resourcefulness to "provide protection of all persons here represented by plaintiffs." It is not denied that those tribunals could provide some type of protection but they certainly could not provide the type of protection to which the employees would be entitled by statute—they could not re-

[2]The transcript of that hearing is not attached and can be made available on 30-minute notice and the witness who testified at the October 12, 1960, hearing can also be made available to testify.

create jobs which had been abolished and re-employ all persons who might be entitled to re-employment; they could not reverse the so-called "bumping" process involved in the exercise by employees of their seniority rights and re-move employees as a result; they could not reinstate the fringe benefits which would be lost to those deprived of employment or the annuity rights of those whose accounts had been transferred to Social Security; they could not in any practical sense, "unscramble the egg."

Judge O'Sullivan errs in two respects when he says that the National Labor Relations Board has "unscrambled" such problems many times. First, the NLRB has never been faced with a similar problem because no labor act under which it operates contains provisions remotely similar to those found in Section 5(2)(f) and therefore it has never had to recreate abolished jobs, reverse "bumping" processes and reinstate lost statutory benefits. Second, the NLRB is concerned primarily with industries concentrated at one point and does not become involved in the complexities attendant to the exercise of seniority rights resulting in the transfer and re-transfer of employees halfway across the country.

Therefore, on the one hand, the employees of the railroad will be irreparably damaged and deprived of their right of Supreme Court review of their cause if the temporary restraining order is lifted while, on the other hand, if its provisions remain in effect the United States and the Commission, the primary defendants in this case, can not be harmed in any way and the intervening defendant Erie-Lackawanna Railroad Company merely would be required to postpone for a short time some of the economic benefits of the merger.

The Erie-Lackawannt originally claimed that a postponement of the effective date of the merger would cost it

$37,000 a day. This calculation apparently was based upon Appendix D, page 7 of Exhibit H-48, known as the "Wyer Report", wherein it was estimated that at the end of the *fifth* year following ICC approval of the merger and thereafter, the merged company would save $13,542,038 per year. On the same page, however, the Exhibit clearly demonstrates that during the *first* year following the Commission's order of approval the merged company would save but $1,268,189. However, even this cost was lessened by the fact that the temporary restraining order entered in this case did not prevent the merger of the railroads in any respect save the abolishment and transfer of jobs. Study XVI of Exhibit H-48 discloses that the Erie-Lackawanna intends to abolish 403 jobs and transfer 430 jobs throughout the entire first year following Commission approval of the merger. This represents approximately 20 percent of the total jobs to be abolished and transferred during the five years following Commission approval of the merger. None of the savings realized through economies other than those to be effected at the expense of the employees are prevented by continuation of the temporary restraining order.

In the last analysis the savings to be realized by job abolishments and job transfers are not lost but are deferred. On the other hand, the harm done to employees by dissolution of the temporary restraining order is permanent and irreparable.

Finally, the defendants, at least theoretically, are required by the provisions of the so-called New Orleans conditions to keep financially whole all employees deprived of employment, displaced or required to move as a result of the merger. Therefore, the savings of moneys to the railroad as a result of dismissing, displacing or transferring

employees must nearly equal any moneys which the railroad could save by taking such action and, as pointed out above, the latter course while involving relatively minor savings to the railroad would cause irreparable injury to the employees.

VI

Request for Oral Argument

Oral argument on the foregoing application is respectfully requested.

Conclusion

In view of the foregoing it is respectfully submitted that a reinstatement and continuation of the temporary restraining order is an absolute necessity to the consideration of this case by this Court and because of that fact and the irreparable damage which will occur to employees represented by plaintiffs if the status quo is not continued the temporary restraining order should be reinstated and continued until this Court has an opportunity to pass upon the vitally serious question presented by this case.

It is respectfully submitted that the following quotation from the opinion of the United States District Court for the Southern District of New York in *Farr & Company, et al.* v. *The S. S. Punto Alice, et al.*, 144 F. Supp. 839 (1956) is most applicable here (144 F. Supp. at 841):

> "In view of the fact that a serious question of law is involved, that the respondent has appealed the determination of this Court, and that to refuse to grant the stay requested would compel the respondent to enter into a proceeding which conceiv-

ably could make the appeal moot, this court believes that the relief sought by the respondent in aid of its appeal should be granted in order to preserve the status quo of the parties.

"The provisions of the orders of this court appealed from by respondent's notice of appeal dated June 28, 1956 should be and hereby are stayed until such time as the United States Court of Appeals for the Second Circuit dismisses or determines the appeal."

Respectfully submited.

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Attorneys for Appellants

January 10, 1961

APPENDIX C

IN THE

SUPREME COURT OF THE UNITED STATES

UNDOCKETED, OCTOBER TERM 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and RAILWAY LABOR EXECUTIVES ASSOCIATION, *Appellants,* —*against*— UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and ERIE-LACKAWANNA RAILROAD COMPANY, *Appellees.*	No.

MEMORANDUM OF APPELLEE ERIE-LACKAWANNA RAILROAD COMPANY IN OPPOSITION TO MOTION FOR STAY

Before the Honorable Potter Stewart, Associate Justice and Circuit Justice for the Sixth Circuit:

In this appeal, appellants* will seek reversal of the unanimous affirmance by the three-judge statutory court** of the unanimous decision of the Interstate Commerce Commission (Commission).

*While appellants have not yet docketed their appeal, the terminology of appellants and appellees is used in this memorandum.

**The United States District Court for the Eastern District of Michigan heard the proceedings below as a three-judge court convened pursuant to 28 U. S. C. § 2321 *et seq.*, and was composed of Clifford O'Sullivan, Circuit Judge, Theodore Levin, Chief Judge, and Thomas P. Thornton, District Judge.

Appendix C

Appellants' Motion for Stay requests that a temporary restraining order (entered after a preliminary hearing by Judge Thomas P. Thornton and vacated by the three-judge court after decision on the merits) be revived and continued in effect for the extended period before decision of this appeal.

A brief review of the proceedings is in order, to indicate both the nature of the case and the extravagant nature of appellants' request in the Motion for Stay.

Statement of the Case

Appellants initiated this action on October 7, 1960 and requested, as preliminary relief, that the merger of The Delaware, Lackawanna & Western Railroad Company (Lackawanna) into the Erie Railroad Company (Erie) be enjoined. This merger was scheduled for consummation on October 17th pursuant to Commission Order duly entered September 13, 1960.

At a hearing on October 12th, District Judge Thomas P. Thornton permitted the merger to proceed but entered, under date of October 14th, a temporary restraining order to preserve the employment status quo pending early hearing and disposition of the case on the merits.

The sole legal question involved in this case is appellants' contention that Section 5(2)(f) of the Interstate Commerce Act, 49 U. S. C. § 5(2)(f), "requires the Interstate Commerce Commission to impose as a minimum upon every transaction approved by the Commission under Section 5(2) the condition that every employee affected must be retained in an *employment status* for a period equal in time to his service with the railroad carrier not

to exceed four years." (See Page 2 of the copy of the District Court's Opinion, attached as Appendix A).

Appellants' contention had been flatly rejected by the Commission, their Opinion stating:

> "Assuming that we have the power to impose conditions like those requested by the association, in our opinion, such action would not be consistent with the public interest. Conditions calculated to preserve unneeded jobs would unduly restrict the applicants in the establishment of most economical operations, would be wasteful, and would be in conflict with the objectives of the national transportation policy, under which we are enjoined to promote economical and efficient service and to foster sound economic conditions in transportation and among the several carriers". (Sheets 17-18)

After being fully briefed, and argued at the hearing held November 15th, appellants' contention was again flatly rejected by the statutory court in opinion filed December 7, 1960 which held:

> "A requirement that carriers retain employees following mergers would sterilize provisions of the Act which is designed to promote economy partially through the reduction of personnel."

In so holding the District Court followed the Commission's consistent interpretation of the statute since its enactment in 1940, an interpretation, moreover, in which the appellant unions have concurred until their present belated challenge.

On December 8th, appellants sought a stay of the lower court's order, and, after two hearings on such motion (December 8th and December 19th), the court on December 19th entered two orders, one dismissing the complaint

and vacating the temporary restraining order and the other denying any stay pending appeal.

Appellants now ask that a stay in the form of the temporary restraining order (which produced chaos on the merged railroad during the brief period it was in force*) be revived for an extended period of a year or more.** The form of injunction proposed would seem to provide an interim solution through agreement between the parties. However, with one minor exception, the railway brotherhoods refused to enter into any agreements permitting transfers while the temporary restraining order was in effect, resulting in a job freeze. No different behavior can be expected if an extended stay is granted. Indeed, in the absence of the guide lines found in the New Orleans Conditions there is no discoverable basis for such agreements as any stay might contemplate. Appellants contend on this appeal that the employee protective conditions developed over the last 25 years by railway labor and management and by the Commission are now completely unacceptable. Any stay, then, would leave the merged company with no alternative but to attempt to bargain in a vacuum with each of the 20 brotherhoods of the RLEA which represent its employees.

Moreover, in connection with this broad request, appellants offer no bond.

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*See Affidavit of Garret C. White, attached hereto as Appendix B.

**It should be noted that the proposed relief goes beyond the ultimate relief appellants seek. As noted above, appellants' contention on the merits is that Section 5(2)(f) requires that employees be retained in an active employment status. The temporary restraining order, however, (designed for a brief period) *also* required that the Erie-Lackawanna not "abolish the position of" any employee or "transfer his place of employment" unless such transfer was pursuant to agreement with the appropriate collective bargaining representative.

Appendix C

ARGUMENT

The narrow function of this Court in reviewing the three-judge court's decision to refuse a stay is limited to a determination "whether the discretion of the Court below has been abused." *Alabama* v. *United States*, 279 U. S. 229, 231 (1929); and see also *Cumberland Tel. Co.* v. *Louisiana Pub. Serv. Comm.*, 260 U. S. 212, 219 (1922). The area of determination is even more circumscribed when, as here, the three-judge District Court has denied a stay pending appeal and the application for a stay is presented to a single Justice of this Court. For, as stated by Mr. Justice Harlan in a chambers opinion on an application for stay in *Breswick & Co.* v. *United States*, 75 Sup. Ct. 912, 915 (1955):

> "It goes without saying that a single Justice's stay powers in a case such as this should be exercised most sparingly, both in fairness to the prevailing parties below and out of deference to the Court. A single Justice may also be expected to give due regard to a lower court's denial of a stay."

See also *United States ex rel. Knauff* v. *McGrath*, October Term 1949 (opinion of Mr. Justice Jackson, printed at 96 Cong. Rec. A3751).

The court below did not abuse its discretion. Rather, its denial of a stay followed the principles established by this Court to govern cases involving the public interest. *Virginian Railway Co.* v. *United States*, 272 U. S. 658, 668-75 (1926); *Yakus* v. *United States*, 321 U. S. 414, 439-42 (1944).

In the *Virginian* case, Mr. Justice Brandeis, speaking for the unanimous Court in vacating a stay of an Inter-

state Commerce Commission order granted by a three-judge court, held as follows, 272 U. S. at 672-73:

> "*Seventh.* The Government contends that, even if the District Court had power to say (sic) the order of the Commission pending the appeal in this Court, its action was not warranted by the facts. A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. In re Haberman Manufacturing Co., 147 U. S. 525. It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case. An application to suspend the operation of the Commission's order pending an appeal from a final decree dismissing the bill on the merits calls for the exercise of discretion under circumstances essentially different from those which obtain when the application for a stay is made prior to a hearing of the application for an interlocutory injunction, or after the hearing thereon but before the decision. In the two latter classes of cases, if the bill seems to present to the court a serious question, the fact that irreparable injury may otherwise result to the plaintiff may, as an exercise of discretion, alone justify granting the temporary stay until there is an opportunity for adequate consideration of the matters involved. But to justify a stay pending an appeal from a final decree refusing an injunction additional facts must be shown. For the decree creates a strong presumption of its own correctness and of the validity of the Commission's order. This presumption ordinarily entitles defendant carriers and the public to the benefits which the order was intended to secure.
>
> "In this class of cases an appeal bond can rarely indemnify fully even private parties to the litigation for the loss of the benefits of which the stay deprived

> them, and the public would usually be left wholly remediless. To justify granting the stay after a final decree sustaining the Commission's order, it must appear either that the district court entertains a serious doubt as to the correctness of its own decision, or that the decision depends upon a question of law on which there is conflict among the courts of the several circuits, or that some other special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court."

Justice Brandeis' statement of the law is so clear and so clearly pertinent that extended elaboration is unnecessary.

Briefly, then, the *Virginian* and *Yakus* cases completely dispose of the present application, as follows:

1. The overriding public interest is amply demonstrated in this case by the findings and conclusions of the Commission and the Court below, and the affidavit of Garret C. White.* Accordingly, even if appellants could conclusively establish irreparable injury they would not be entitled to a stay.

2. To the extent that irreparable injury to a private party can ever be relevant when the public interest is involved, there are two reasons why appellants' claim of irreparable injury fails:

(a) In the first place, appellants' showing is wholly insufficient. They rely simply upon the finding of irrepar-

*Some of the bizarre effects which Erie-Lackawanna has experienced under the dissolved temporary restraining order, and which would continue if the present application is granted, are detailed at pages 3-4 of the White Affidavit. The serious financial consequences are stated at pages 5-6.

able injury made in the temporary restraining order issued by a single judge prior to the impaneling of the three-judge court. This reliance is wholly misplaced because, as held in the *Virginian* case, 272 U. S. at 673:

> "An application to suspend the operation of the Commission's order pending an appeal from a final decree dismissing the bill on the merits calls for the exercise of discretion under circumstances *essentially different* from those which obtain when the application for a stay is made prior to a hearing of the application for an interlocutory injunction, or after the hearing thereon but before the decision. In the two latter classes of cases, if the bill seems to present to the court a serious question, the fact that irreparable injury may otherwise result to the plaintiff may, as an exercise of discretion, alone justify granting the temporary stay until there is an opportunity for adequate consideration of the matters involved. But to justify a stay pending an appeal from a final decree refusing an injunction additional facts must be shown." (Emphasis supplied.)

Recognizing the different tests governing the issuance of temporary restraining orders before hearing and stays pending appeal, the three-judge court found the irreparable harm testimony supporting the temporary restraining order not controlling for the purpose of a stay pending appeal. The temporary restraining order, therefore, offers no support for the present application, and the stay must be refused because appellants have not met the *Virginian* command that "additional facts must be shown".

(b) Second, the evidence submitted in support of the request for a temporary restraining order, being in the nature of predictions prior to the merger, was necessarily

conjectural and speculative. In sharp contrast is the actual experience suffered by Erie-Lackawanna under the temporary restraining order as set forth in the White Affidavit. If the equities are to be weighed at all, it is submitted that the facts show that the balance is clearly with Erie-Lackawanna, for, as the White Affidavit establishes, the result of a stay will be financial catastrophe for the Erie-Lackawanna. Moreover, a stay would have an immediate impact upon the general railroad work force, for the continuance of financial difficulties would require the furloughing of many employees (indeed, several times the number affected by merger) with no compensatory benefits other than those offered by the unemployment compensation laws.

3. The three-judge court below entertained no doubt as to the correctness of its own decision and there is no conflict among the Circuits on this subject.* Indeed, appellants' contention in this case was debated and rejected by Congress when the present Section 5(2)(f) was enacted in 1940 and lay dormant for 20 years while the Commission with the acquiescence of railway labor developed the pattern of compensatory benefits in over 80 proceedings under Section 5(2)(f).

4. An appeal bond could not indemnify Erie-Lackawanna fully and there is no way to indemnify the public. As noted, appellants here have not even offered a bond.

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*Appellants do claim that two opinions of this Court, *Railway Labor Executives Ass'n.* v. *United States*, 339 U. S. 142 (1950), and *Order of Railroad Telegraphers* v. *Chicago & North Western Ry.*, 362 U. S. 330 (1960), are involved, but the court below deemed both cases to be inapposite to appellants' contention. See pp. 6 and 7 of the opinion.

Appendix C

In an effort to find some special reason why the Commission's order should not become operative, appellants assert that, in the absence of a stay, the case on the merits may become moot. As a matter of fact the economies and improvements which the Erie-Lackawanna hopes to achieve will not be accomplished entirely for a period of five years. Accordingly, many employees will not even begin to feel the impact of the merger until the end of that five year period.

There can therefore be no serious contention that a possibility of mootness exists here.*

---

*Even if it were conceivable that the case might become technically moot during the pendency of the appeal, that would not necessarily defeat the jurisdiction of this Court. For, jurisdiction has been retained, despite claims of mootness, in cases where the act against which relief is sought may have a continuing effect, or where a question of public importance is involved, or where the case involves interpretation of a statute or regulation which may provide a useful guide for future administrative action. *Southern Pacific Terminal* v. *ICC*, 219 U. S. 498, 515 (1911); *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897); *Gay Union Corporation* v. *Wallace*, 112 F. 2d 192, 195 (D. C. Cir., 1940); *Watling* v. *Haile Gold Mines*, 136 F. 2d 102, 105-06 (4 Cir., 1943). Also, as this Court has stated, a party to an injunction proceeding cannot moot it by completing the acts sought to be enjoined. *Texas & New Orleans Railroad* v. *Northside Belt Railway*, 276 U. S. 475, 479 (1928); *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 15-16 (1936).

There is, therefore, no basis for contending that this case will become either factually or legally moot during the pendency of the appeal. The mootness contention of appellants is really the assertion in another form of their irreparable injury argument. The fact that some employees may be discharged or transferred, if a stay is not granted, will not produce mootness. At most, it will produce only individual hardship to those employees, the extent of which is questionable in view of the compensatory New Orleans Conditions imposed in the order approving the merger. But, for the reasons previously stated, the possibility, or even the actuality, that such individual hardship may result, is no reason for granting a stay in a case of this kind involving the public interest.

Appendix C

Conclusion

For the above stated reasons, the motion should be denied.

Respectfully submitted,

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Appendix C

IN THE

SUPREME COURT OF THE UNITED STATES

UNDOCKETED, OCTOBER TERM 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and RAILWAY LABOR EXECUTIVES ASSOCIATION, *Appellants,* —*against*— UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and ERIE-LACKAWANNA RAILROAD COMPANY, *Appellees.*	No.

Affidavit of Garret C. White

STATE OF OHIO
COUNTY OF CUYAHOGA, } ss.:

GARRET C. WHITE, being duly sworn, deposes and says:

1. I am Vice President—Operations of Erie-Lackawanna Railroad Company (Erie-Lackawanna). I am familiar with and actively participated in the proceeding involving the Erie Railroad Company (Erie) and The Delaware, Lackawanna & Western Railroad Company's (Lackawanna) joint application to the Interstate Commerce Commission (Commission) for permission to merge Lackawanna into Erie. I am also familiar with the proceedings brought by appellants before a three judge court in the Eastern District of Michigan, Southern Division, and with appellants' present application for a stay. I make

this affidavit in opposition to that application by appellants. If the application is granted, I am convinced that the result would be to cripple and perhaps to destroy the Erie-Lackawanna.

2. I have held my present position as Vice President—Operations of Erie Lackawanna since October 17, 1960. Prior to that date I was Vice President—Operations of Erie, having served in that capacity since 1956. I have been continuously employed by the Erie since 1925 and I have held a series of positions during that period. As Assistant Vice President from 1951 to 1956, I was responsible for all negotiations in behalf of Erie with labor organizations. Since 1956 the officer in charge of such negotiations has reported directly to me. Moreover, since 1951, I have continuously served as a member of the Eastern Carriers Conference Committees and as a member of the Section 13 Committee, under the Washington Job Protection Agreement of May, 1936. I have therefore been continuously concerned with the many labor problems confronting the railroad industry and particularly with those problems presented in this case.

3. Appellants represent the vast majority of Erie-Lackawanna's employees. In the court below and before the Commission, appellants contended that the Commission was required by law to provide that all employees affected by the merger of Lackawanna into Erie must be retained in an active employment status for four years. The court below and the Commission unanimously rejected that contention and the court below also denied plaintiff's motion for a stay or injunction pending appeal.

4. By the present motion for a stay, appellants seek to reinstate the temporary restraining order entered by a single judge below on October 14, 1960, and vacated by the unanimous court below on December 19, 1960. Appellants thus ask this Court to impose terms which would not only require Erie-Lackawanna to retain all employees in an active employment status, but also would prevent Erie-Lackawanna from transferring, or abolishing the position of, any employee.

5. Under the terms of the stay sought by appellants, as was the case under the temporary restraining order, Erie-Lackawanna would be almost entirely prevented from consolidating the separate operations of the Erie and Lackawanna. Technically, the Erie-Lackawanna merger was accomplished on October 17, 1960. However, we have been forced to continue to duplicate nearly every operation and function. Moreover, many such costly duplications are conducted in widely separated locations which increases the confusion.

Some examples of the duplications are the maintenance of two separate revenue accounting departments—one in Cleveland, Ohio, and one in Scranton, Pennsylvania; the maintenance of two disbursement accounting departments—one in Hornell, New York, and one in Scranton, Pennsylvania; the duplication of car-tracing procedures—requiring diversion messages to be sent to both Cleveland, Ohio, and Scranton, Pennsylvania; duplication of telephone switchboards (at an annual extra cost for rental of an additional switchboard in the New York area alone of $16,000.00)—requiring calls to be placed through separate switchboards even though calls are made to the same departmental offices at the same general location; duplication and repeated han-

dling of cars in interchange between adjoining yards of the merged company in the same location; duplication of road trains operating between the same terminals and over identical tracks between Binghamton and Corning, N. Y., a distance of 76 miles.

Many of these duplicated operations and functions in fact result in increased costs to the merged railroad over and above the costs which would have been incurred if the two constituent railroads had continued to operate independently. Elimination of all of this duplication is, as the Commission found, in the public interest. Indeed, Erie-Lackawanna must be permitted to effect these savings or its service to the public and its very existence will be imperiled.

6. The injunction sought by appellants contains a provision purportedly permitting consolidation of functions to be achieved pursuant to "the terms of an interim and/or implementing agreement with the appropriate collective bargaining representative." Under the temporary restraining order issued below we negotiated extensively with all of the unions in an attempt to work out such agreements. However; with one very minor exception, we were unable to do so. My subordinates have been repeatedly informed by bargaining representatives of the various unions that they had been instructed not to sign any such agreements while a restraining order is in effect.

7. It is doubtful that Erie-Lackawanna could avoid bankruptcy should the Court grant the injunction requested by appellants, because such an injunction would, as in the case of the temporary restraining order of October 14, 1960, prevent it from effecting the economies and eliminating the

duplications of facilities and operations contemplated by the Commission's order. For the first ten months of 1960 the Erie and the Lackawanna suffered a combined net deficit of $13,753,000. That compares with a net deficit for the two companies for the same period in 1959 of $8,931,000, or an increase in net deficit of $4,822,000. In November, 1959, the two companies had a combined net deficit of $1,230,000. In November, 1960, the merged company had a net deficit of $2,375,913 for the month. Accordingly, the net deficit for the first eleven months of 1960 is $16,129,174 as compared with $10,161,173 for the same period in 1959. On December 31, 1959, the current assets of the Erie and Lackawanna (exclusive of material and supplies) exceeded current liabilities by $10,572,000. On November 30, 1960, that figure had declined to $2,385,989, or a decrease of $8,186,011, in the eleven-month period. This figure gains significance when it is realized that the monthly payroll of Erie-Lackawanna is approximately $10,000,000. Losses would have been substantially greater if the Erie and the Lackawanna had been conducting a normal maintenance program with respect to roadway, rolling stock and other physical facilities. Since 1957 both the Erie and the Lackawanna have been forced to defer normal maintenance. Such deferral cannot long continue without affecting efficient and competitive service. Indeed this problem is so serious that within the last few weeks Erie-Lackawanna, being unable to provide therefor out of normal revenues, had to borrow $1,600,000 just to make essential repairs on cars.

It is expected that, if the merged company is able to consolidate all its functions, financial calamity can be avoided. The studies upon the basis of which the merger of Erie and Lackawanna was proposed to the Commission estimated that the merging of the two companies would

eventually result in savings of $13,500,000 a year. That would mean that once the merger is fully consummated Erie-Lackawanna can expect to save $37,000 per day. It was estimated that it would take five years from the date of the merger for the ultimate savings to be realized. However, that estimate was based upon an assumption that Erie-Lackawanna would immediately be able to consolidate functions and operations. An insignificant amount of consolidation has taken place at the management level, but until complete consolidation can be achieved the savings eventually to be realized are being further postponed. Thus, every single day that consolidation is postponed Erie-Lackawanna is losing nearly all of that $37,000 per day. Appellants refuse to bond any portion of that loss or of any of the other losses Erie-Lackawanna would suffer as a result of an injunction.

In the light of all of the facts stated above, it is plain that the probable effect of an injunction would be to force Erie-Lackawanna into bankruptcy.

/s/ GARRET C. WHITE
Garret C. White

Sworn to before me this
9th day of January, 1961.

/s/ THOMAS D. CAINE
Thomas D. Caine, Notary Public
State of Ohio

[NOTARIAL SEAL]

My Commission Expires Aug. 26, 1962

APPENDIX D

IN THE

SUPREME COURT OF THE UNITED STATES

UNDOCKETED, OCTOBER TERM 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and RAILWAY LABOR EXECUTIVES ASSOCIATION, *Appellants,* —*against*— UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and ERIE-LACKAWANNA RAILROAD COMPANY, *Appellees.*	No.

SUPPLEMENTAL STATEMENT OF APPELLEE ERIE-LACKAWANNA OPPOSING MOTION FOR STAY

The memorandum of appellee Erie-Lackawanna opposing the stay demonstrates that appellants have not made a sufficient showing under *Virginian Railway Co.* v. *United States,* 272 U. S. 658 (1926), to justify granting a stay and that, if the equities are to be weighed at all, the balance is in favor of Erie-Lackawanna. However, since the only claims of possible harm made by appellants are of relatively minor consequence in the total picture, Erie-Lackawanna is willing to give certain assurances pending disposition of this appeal which, it is submitted, eliminate any justification for a stay.

Appellants' only claims of financial harm are based on the findings of Judge Thornton made on the application for temporary restraining order prior to the decision of the three-judge court dismissing the complaint. (Pp. 6-7 of

appellant's application). Those alleged claims of harm are as follows:

(1) that annuity rights under the Railroad Retirement Act would be jeopardized;

(2) that fringe benefits would become inoperative;

(3) that, under the New Orleans Conditions imposed by the Commission, Erie-Lackawanna is obligated only to pay for one move of an employee and, if he were required to move his residence a second time, the employee would have to bear the burden of such move.

The only other adverse result which appellants urge will follow if a stay is not granted is the possible personal inconvenience which may be occasioned to employees who may be bumped, furloughed or required to change their residence by reason of the merger, but the New Orleans Conditions make them financially whole and such personal inconvenience is certainly not the kind of harm justifying a stay.

In order to eliminate these possible sources of minor financial harm which appellants fear, and to minimize the personal inconvenience which they assert may otherwise result, we are authorized to make the following assurances on behalf of Erie-Lackawanna. Such assurances will be observed during the pendency of this appeal and are on condition that there be no stay and that appellants cooperate with appellees to make every effort to expedite this appeal to the end that it be determined during the present Term.

1. Paragraph 6 of the Oklahoma Conditions, which is a part of the New Orleans Conditions, provides as follows:

"6. No employee affected by the transaction approved herein shall be deprived during the protective

period of benefits attached to his previous employment, such as free transportation, pensions, hospitalization, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service or on furlough, as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained."

Erie-Lackawanna will comply with the requirements of such Paragraph and, in accordance therewith and the Railroad Retirement Act, Erie-Lackawanna will make the appropriate company contributions to the Railroad Retirement Fund with respect to any employee furloughed as a result of the merger.

2. In addition to benefits due under the above quoted Paragraph 6 of the Oklahoma Conditions, Erie-Lackawanna will pay to each employee furloughed by reason of the merger who at the time is covered by company maintained hospital insurance an amount equal to the monthly premium cost to such covered employee* of maintaining his benefits under the comparable Travelers Insurance Company Policy GA-23111 which has been in operation for some time for the benefit of furloughed employees.

3. If any employee is required to move his place of residence more than once as a result of the merger, Erie-

*"Covered employees" are non-operating employees who receive hospitalization insurance. Operating employees elected to receive an increase in pay in lieu thereof and such affected employees would, of course, have that increase reflected in salary payments under the New Orleans Conditions.

Lackawanna will pay the benefits with respect to any such move, just as in the case of the first move as provided for under the New Orleans Conditions.

4. In carrying out the merger and in effecting the elimination of duplicate operations and facilities which the merger was designed to accomplish, Erie-Lackawanna will do everything in its power to minimize the so-called bumping of, inconvenience to and dislocation of its employees, consistent with orderly implementation of the merger and the public interest to be served thereby.

5. Specifically to that end, and consistent with the foregoing, Erie-Lackawanna will endeavor to minimize the transfers of employees requiring a change of residence. Erie-Lackawanna has a strong incentive in that respect since it will cost substantial amounts to compensate employees for such transfers.

The assurances herein extend to each employee of the Erie-Lackawanna who had an active employment status with the Erie Railroad Company or The Delaware, Lackawanna & Western Railroad Company on October 12, 1960, and who is represented by a union whose chief executive officer is a member of the Railway Labor Executives Association, and any such employee shall be entitled to the benefits of such assurances during the pendency of this appeal, but no longer than the maximum period of his entitlement under Section 5(2)(f) of the Interstate Commerce Act.

In the light of these assurances, there can be no justification for the stay which appellants seek. That stay must be denied to avoid the serious financial consequences which would otherwise result to Erie-Lackawanna and the harm

which that would cause to the public interest and the national transportation policy.

Respectfully submitted,

/s/ RALPH L. MCAFEE
Ralph L. McAfee
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New York 5, N. Y.

/s/ JOHN H. PICKERING
John H. Pickering
616 Transportation Building
Washington 6, D. C.

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Of Counsel.

APPENDIX E

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and ERIE-LACKAWANNA RAILROAD COMPANY

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO MOTION FOR STAY

1. Whether a stay pending appeal is warranted in the circumstances shown by the moving papers depends on a balancing of the equities, specifically in relation to the extent of the irreparable injury which would result if a stay were granted or denied. On that basic question, which is addressed to the exercise of sound judicial discretion, we think it is manifest that in this situation some degree of irreparable injury is unavoidable whichever disposition is made of the motion for stay. On the one hand, it is clear that any postponement of the consolidation, insofar as it would achieve elimination of overlapping and uneconomical facilities and jobs, would necessarily result in loss to the

railroad and thus further impair its present precarious financial situation. On the other hand, dismissals, demotions, or transfers of employees during the pendency of the appeal, even though the affected employees are given financial protection under the "New Orleans conditions" included in the Commission's order, would necessarily result in intangible but nonetheless very real injury. Dislocation of families, uprooting them from the communities in which they live, with all the attendant personal hardships and inconveniences, cannot be disregarded in determining "irreparable injury." The basic command of the statute, as this Court emphasized in *Railway Labor Executives' Association* v. *United States*, 339 U. S. 142, is that "the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected" (49 U. S. C. 5(2)(f)). In its supplemental memorandum of this date, the railroad recognizes its obligation to prevent hardship to its employees if it can be avoided consistently with the ultimate objectives of the merger. It has given formal and specific assurances in this regard. Accordingly, in view of these assurances, and especially since there is no challenge to the Commission's determination that consummation of the merger would be in the public interest, the United States believes that, on a balancing of the equities, the stay should be denied.

2. If a stay is denied, however, it is certainly in the public interest, and in the interest of the private parties, that the issue involved on this appeal be resolved promptly and without unnecessary delay. The proceedings in the District Court were fully disposed of within less than three months from filing of the complaint. To the extent that any employees would be adversely affected by actions taken

while the appeal is pending, to implement the plan of consolidation, it is surely in the interest of appellants to expedite the Court's consideration and disposition of the appeal. There appears to be no reason why appellants should not be able to docket the case and file their jurisdictional statement by February 1. This would permit the filing of prompt motions to affirm, and perhaps enable the Court to determine at its February session whether probable jurisdiction should be noted or the motions to affirm be granted. If the former disposition is made, the parties should be able to agree on an accelerated briefing schedule which would allow the case to be heard and decided at the present Term. So far as the Government is concerned, it will cooperate fully to that end.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

JANUARY 12, 1961.

APPENDIX F

IN THE

SUPREME COURT OF THE UNITED STATES

UNDOCKETED, OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and ERIE-LACKAWANNA RAILROAD COMPANY,
Appellees.

ON APPEAL FROM THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

REPLY OF APPELLANTS TO SUPPLEMENTAL STATEMENT OF APPELLEE ERIE-LACKAWANNA AND MEMORANDUM IN OPPOSITION TO MOTION FOR STAY OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

To the Honorable Potter Stewart, Associate Justice of the Supreme Court of the United States:

The appellants respectfully request permission to file this reply to the Memorandum of the United States and the Interstate Commerce Commission (hereinafter referred to as the "Government") and the Supplemental Statement of appellee Erie-Lackawanna in view of the fact that the Sup-

plemental Statement sets forth certain "assurances" which are presented for consideration for the first time and upon which the Government heavily relies in opposing the Motion for Stay.

This reply will first consider the Government's Memorandum and then take up the "assurances" set forth in the Supplemental Statement of the railroad.

1. *Memorandum for the Government.* The Government's Memorandum admits that the instant proceeding presents to this Court a serious and substantial question of law. There is no intimation that the issue presented is frivolous and the Government states that "it is certainly in the public interest . . . that the issue involved in this appeal be resolved promptly and without unnecessary delay."

The Government also admits that the effect of a dissolution of the temporary restraining order pending this appeal "would necessarily result in intangible but nonetheless very real injury" to employees and their families. While the Government agrees that the intangible injury about which it speaks "can not be disregarded in determining 'irreparable injury' " it avoids mentioning the primary irreparable injury which would be suffered by employees; namely, the dislocation of employees caused by the bumping process attendant to the exercise of seniority rights upon the abolishment of jobs. As pointed out in our Motion for Stay (pp. 6-7) the lower court specifically found that it would be impossible "to place the man back in status quo in the event that they were dislocated by virtue of the merger."

With regard to the effect which the continuation of the temporary restraining order would have upon the railroad, the Government states that it would "necessarily result in loss to the railroad and thus further impair their present pre-

carious financial situation." It is significant, however, that the Government makes no claim that the grant of a stay in this case would constitute a threat of bankruptcy nor does it deny appellants' contention that the "loss" to the railroad is in fact a mere delay in securing some of the financial benefits of the merger.

The Government argues that the railroad recognizes in its Supplemental Statement that there is an obligation to prevent hardship to employees "if it can be avoided consistent with the ultimate objectives of the merger." Obviously, this obligation is present in all cases and appellants have trusted that the railroad would live up to this obligation to the best of its ability but it is that hardship which can not be avoided "consistent with the ultimate objectives of a merger" that appellants seek to prevent pending their appeal in this case.

The Government relies upon certain "assurances" set forth in the railroad's Supplemental Statement and concludes that the stay should be denied because of these assurances; because there is no challenge to the Commission's determination that the merger would be in the public interest and because the Government believes that, granted the existance of the "assurances", a balancing of the equities favors denial.

The appellants have never challenged the Commission's determination that the merger would be in the public interest and, in fact, have never tried to enjoin the merger. Appellants have always and only attempted to prevent the irreparable injury to the employees they represent pending a determination of the serious question of law presented here. Appellants have only tried to stay that injury and the Government clearly admits that if the restraining order is not continued that injury will take place.

Appendix F

The Government does not challenge the contention that a denial of a temporary restraining order would deprive appellants of their right of appeal. In view of this fact and in view of the relative harm to the parties in this case it is respectfully submitted that the balancing of the equities indicates that the stay should be granted. This is particularly true since, as will be shown below, the "assurances" do not protect the employees against irreparable injury.

Finally, the Government states that if the stay is *denied* the appellants should file their jurisdictional statement by February 1 and if probable jurisdiction is noted the parties should agree on an accelerated briefing schedule which would allow the case to be heard and decided during the present Term. This position of the Government apparently supports appellants' position that a denial of a stay in this case will moot the issue presented unless it is resolved by this Court immediately.

If denial of a stay would not deprive appellants of their right of appeal, the Government's position is one which is patently unfair to appellants as it would place stringent time limitations upon them for no valid reason.

Appellants have always done all in their power to expedite this proceeding as is evident from the expeditious handling of this case in the lower court. The appellants, in fact, would readily agree to the filing of a jurisdictional statement by February 1, 1961, as a condition for the issuance of a stay in this case. Appellants would also agree to any other dates which this Court might see fit to set if the Court felt that its calendar permitted argument and decision during this Term, however, appellants will not presume to base any agreement upon a condition that this Court hear and decide this case during this Term.

Appendix F

2. *Supplemental Statement of Erie-Lackawanna.* The Supplemental Statement of the railroad begins with a citation of *Virginian Railway Co.* v. *United States,* 272 U. S. 658 (1926), and a claim that appellants have not made a sufficient showing under the holding in that case to justify the granting of a stay here.

It is respectfully submitted that the *Virginian* case supports appellants' request for stay. That case specifically provided that the granting of a stay sustaining the Commission's order may be justified if a "special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court." (272 U. S. at 673.) This case, of course, involves such special reason, namely, the loss of appellants' right of appeal if the stay is not granted.

In addition, unlike this case, the *Virginian* case involved a situation wherein the lower court issued no opinion, either written or oral, which was interpreted by this Court "as tantamount to a declaration that upon careful scrutiny of the record the questions presented for judicial determination appeared to be simple; or, at all events, that the case did not involve the determination of any question of law which was novel or as to which there was, or could be, reasonable doubt."[1] (272 U. S. at 674.)

In its Supplemental Statement the railroad also contends that "the only claims of possible harm made by appellants are of relatively minor consequence in the total picture." This contention is directly contradictory of the

[1]At the conclusion of the hearing on the temporary restraining order the lower court informed the parties that if they would submit their briefs one week prior to the date set for the hearing on the merits, the court would issue its decision within one week thereafter. However, the court did not issue its decision for three weeks.

oral and written findings of the lower court set forth at pp. 6 and 7 of appellants' Motion for Stay, as well as the recognition by the Government of the "very real injury" which will occur to employees and their families.

The railroad attempts to relegate the irreparable injury which would be suffered by its employees to claims of financial harm. This, again, is directly contradictory of the oral and written findings of the lower court as set forth in appellants' Motion for Stay and the conclusions of the Government as set forth in its Memorandum.

The railroad then attempts to picture the effect of the bumping process as a "possib' personal inconvenience" and indicates that the so-called New Orleans Conditions will make "bumped" employees financially whole.

Appellants re ectfully submit that the railroad here involves itself in a patent attempt to slough off the most important element of adverse effect which will result to employees if a stay is not issued; namely, the effects of the operation of the bumping process. Protection against this element of adverse effect is not provided for in the New Orleans Conditions and the results to employees can not be measured financially. As the lower court found, the bumping process goes well beyond personal inconvenience and results in loss of employment rights which can not be restored and in an indefinite number of moves which can not be reversed.

In any event, as is pointed out in the Motion for St..y, the New Orleans Conditions do not become operative until implementing agreements are executed and once those agreements are executed this case is rendered moot.

Upon the fallacious premise that the harm resulting to employees as a result of the dissolution of the temporary restraining order is purely financial in character, the rail-

road lists certain assurances which it will observe on condition that there be no stay and that "appellants cooperate with appellees to make every effort to expedite this appeal to the end that it be determined during the present Term." As heretofore noted, appellants will make no such agreement but they will continue to treat this case in the most expeditious manner possible.

The railroad assures the Court that it will continue to make contributions to the Railroad Retirement Fund with respect to furloughed employees. However, such action will not protect the Railroad Retirement Act benefits of an employee who is forced to take employment in outside industry and become subject to the provisions of the Social Security Act.

The railroad assures the Court that it will pay furloughed employees an amount equal to the monthly premium cost of maintaining hospitalization benefits. The hospitalization benefits available to furloughed employees, however, are inferior to those available to working employees.

The railroad agrees to pay for any move an employee may be required to make as a result of the merger. In addition to the apparent admission that the railroad contemplates individual employees and their families will be required to make several moves as a result of the merger, this type of moving produces the "intangible but nonetheless real injury" which "can not be disregarded in determining 'irreparable injury' " and which can not be cured financially.

The railroad goes on to assure the Court that it will do everything in its power to minimize the bumping process, consistent with the orderly implementation of the merger and will endeavor to minimize the transfer of employees. Obviously, these duties exist whether or not a stay is

granted. Indeed, appellants assume that the railroad will do what it can to minimize the adverse effect of this merger on its employees and its stockholders but in taking the actions required "consistent with implementation of the merger", the railroad will accomplish the very results which the lower court found would irreparably damage employees and destroy the status quo which is impossible of subsequent restoration.

Conclusion

It is respectfully submitted that the Government's Memorandum and the railroad's Supplemental Statement in effect vitiate the claims of impending bankruptcy contained in the railroad's original memorandum and in the affidavit of Garret C. White attached thereto. The Government does not support those claims in its Memorandum and the railroad, in putting forth the "assurances" contained in its Supplemental Statement, casts serious doubt upon those claims.

Appellants believe it extremely significant that the single most important factor supporting appellants' request for stay—the impossible but necessary re-creation of abolished jobs and reversal of the bumping process—is nowhere challenged by appellees.

In any event, no appellee contends that the railroad would suffer irreparable injury if a stay is granted pending this Court's action on a motion to affirm and as noted above, appellants will agree to the conditioning of a stay upon the filing of their jurisdictional statement with this Court by February 1, 1961. Surely, it can not be seriously contended

appellants are not entitled to a stay until this Court can act on a motion to affirm provided they file their jurisdictional statement by February 1, 1961.

Respectfully submitted,

/s/ JAMES L. HIGHSAW, JR.
James L. Highsaw, Jr.

/s/ WM. G. MAHONEY
William G. Mahoney
620 Tower Building
Washington 5, D. C.
Attorneys for Appellants

January 13, 1961

APPENDIX G

OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON 25, D. C.

January 23, 1961

Re: BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES & RY. LABOR EXEC. ASS'N. v. U. S., I. C. C., and ERIE-LACKAWANNA RR Co., No. ....., O. T., 1960:

Dear Sir:

The Court today entered the following order in the above-entitled case:

"An application was made to Mr. Justice Stewart for an order staying the decree of the three-judge district court in this case insofar as it terminated a temporary restraining order previously entered. The application was referred by Mr. Justice Stewart to the Court. In the light of the representations made by appellee, Erie-Lackawanna Railroad Company, the application is denied without prejudice to its renewal upon the prompt docketing of the appeal. The Chief Justice, Mr. Justice Black, and Mr. Justice Douglas would grant the stay."

Very truly yours,

JAMES R. BROWNING, Clerk

By EDWARD C. SCHADE
Assistant

ECS:ht

Ralph L. McAfee, Esq.
15 Broad Street
New York 5, N. Y.

APPENDIX H

IN THE

SUPREME COURT OF THE UNITED STATES

No. 681, OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and ERIE-LACKAWANNA RAILROAD COMPANY,
Appellees.

ON APPEAL FROM THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

RENEWED APPLICATION FOR STAY

To the Honorable Potter Stewart, Associate Justice of the Supreme Court of the United States:

The appellants, Brotherhood of Maintenance of Way Employes and Railway Labor Executives' Association, having under date of January 10, 1961, filed their application for an order staying the decree of the three-judge district court in this case insofar as it terminated a temporary restraining order previously entered by that court with one judge sitting and this Court having entered an order on January 23, 1961, denying said application with-

out prejudice to its renewal upon the prompt docketing of this appeal, the appellants, having docketed their appeal on January 27, 1961, respectfully renew their application for an order staying the effect of the order of the District Court insofar as it terminates the temporary restraining order previously entered by that court pending final disposition of this appeal by this Court.

REASONS FOR REQUESTING STAY

In support of their Renewed Application for Stay appellants rely upon the reasons set forth in their Application for Stay filed with this Court on January 10, 1961, and in their Reply filed with this Court on January 13, 1961, as well as the further reasons contained in their Jurisdictional Statement filed with this Court on January 27, 1961.

In its order of January 23, 1961, this Court stated that it denied without prejudice the appellants' application "in light of the representations made by appellee, Erie-Lackawanna Railroad Company". Appellants respectfully submit that the representations contained in the supplemental statement of Erie-Lackawanna will not prevent the occurrence of those effects which, if not restrained, will render the status quo impossible of subsequent restoration and thereby will effectively deprive appellants of their statutory right of appeal.

The entire purpose of Section 5(2)(f) is to permit the realization of those merger economies which are made at the expense of employees to be realized through the process of natural attrition. This means that jobs are abolished as they become vacant through death, retirement, resignation or justifiable dismissal for cause. In other words, the savings are to be gained from the *top* of the seniority roster

without the necessity of employees exercising seniority rights to displace other employees who are junior to them.

Denial of the renewed application for stay would permit the realization of savings at employee expense through the immediate abolishment of jobs. This means that as jobs become vacant they must immediately be filled by those employees with superior seniority rights. In other words, the merger savings are gained from the *bottom* of the seniority roster after all employees have exercised their seniority rights and those with inferior seniority rights find themselves with no jobs on which to bid. The exercise of seniority rights often entails moves by employees from one city to another since the geographic area in which an employee may have seniority rights may extend for many miles.

Once this process of the exercise of seniority rights, or "bumping" as it is called, is carried out the previously existing employment situation cannot be restored. Restoration could be attempted but it would involve the re-creation of jobs, the re-moving of employees, the recall to service of all those who have been deprived of employment and the complete reversal of a merged railroad operation. It is this situation which the District Court primarily referred to when it held that the "status quo would be impossible of subsequent restoration".

The representations and assurances of the Erie-Lackawanna do nothing to protect the employees from being deprived of their right under Section 5(2)(f) to continued comparable employment at comparable pay since no action of the Commission could restore the status quo so as to make the employment protection required by Section 5(2)(f) effective for all employees entitled thereto. If the

Commission could not formulate effective protective conditions once the status quo is destroyed this Court would have no factual situation before it upon which it could base effective relief. Such a situation would render appellants' case moot and thereby deprive them of their statutory right of appeal.

Conclusion

For the foregoing reasons, and for the reasons set forth in appellants' original Application for Stay, their Reply and their Jurisdictional Statement filed this day, appellants respectfully renew their application to this Court to reinstate and continue the temporary restraining order maintaining status quo insofar as the employment on the Erie-Lackwanna is concerned until such time as this Court has an opportunity to pass upon the vitally serious question presented by this case.

Respectfully submitted,

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